Supreme Court, U.S.
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No. 93-40

In The

Supreme Court of the United States

October Term, 1993

JOHN J. SCINTO

Petitioner

v.

R. DAVID STAMM et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF THE RESPONDENTS IN OPPOSITION

RICHARD BLUMENTHAL
ATTORNEY GENERAL

CAROLYN K. QUERIJERO*
Assistant Attorney General
Office of the Attorney General
P.O. Box 120
Hartford, CT 06141-0120
(203) 566-4990

**Counsel of Record*

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STATEMENT OF THE CASE

The petitioner John Scinto has brought a petition for writ of certiorari asking this Court to review the judgment of the Connecticut Supreme Court in *Scinto v. Stamm*, 224 Conn. 524, 620 A.2d 99 (1993). This case held that the grading procedures employed by the Connecticut Bar Examining Committee ("CBEC") "have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law," and that a judicial hearing to regrade the petitioner's essay answers, in the absence of any proof of fraud, discrimination, or manifest unfairness, is not constitutionally required. *Id.* at 534-35, reprinted in respondent's appendix at A1.[1/]

The petitioner took the Connecticut bar examination in July, 1989, and received a score of 262.79, below the passing score of 264.fn[2/] *Id.* at 525-26, Resp.

1/ The opinion in *Scinto* was published on February 9, 1993. On March 16, 1993, the Connecticut Supreme Court issued several corrected pages for its opinion, in which the substance of the opinion remained the same, but the Court added a footnote and made a minor change in the accompanying text. Since the petitioner included only the original, uncorrected version of the opinion in his joint appendix, the respondents have included the corrected version in their Appendix at A1, and it is to this corrected version that the respondents cite throughout this brief.

2/ In February, 1990, the petitioner again took the Connecticut bar examination, and received a score of 260.37. *Scinto v. Stamm*, 224 Conn. at 526, Resp. App. A3.

App. A2-A3. In March, 1990, he initiated the present action against the CBEC and R. David Stamm, its Administrative Director, alleging that the CBEC's customs, grading procedures and rules resulted in gross grading errors, created an arbitrary and capricious grading system in violation of his rights to due process under the federal and state constitutions, and caused him to fail the examination. (Memo of Dec., Pet. App. A.31.) Claiming that he deserved more points on his essays, the petitioner sought a judicial hearing on his essay examination, an order admitting him to the Bar outright, and a declaratory judgment holding unconstitutional the rules, regulations and grading procedures of the CBEC. (Memo. of Dec., Pet. App. A.31.)

Both sides filed cross motions for summary judgment, and on January 13, 1992, the trial court granted the respondents' motion and denied the petitioner's motion. The court ruled that the petitioner "ha[d] not submitted any evidence to support his allegations that the CBEC's procedures resulted in gross grading errors ... [and] no evidence to rebut the defendants' affidavit as to the procedures employed to grade the plaintiff's exam." (Memo of Dec., Pet. App. 33-34).

The petitioner timely appealed this judgment to the Connecticut Appellate Court, and on May 7, 1992, the Connecticut Supreme Court transferred the appeal

to itself, pursuant to its authority under Connecticut Rules of Practice § 4023.[3/] On February 9, 1993, the Connecticut Supreme Court affirmed the judgment of the trial Court, holding that the grading procedures employed by the CBEC, which contain numerous built-in procedural safeguards and provisions for multiple reviews of failing examinations, satisfy due process and obviate the need for, or desirability of, a judicial hearing into the adequacy of the petitioner's essay answers. *Scinto v. Stamm*, 224 Conn. at 533-34, 536-39., Resp. App., A10-A11, A13-A16.

The petitioner's motion for rehearing was denied by the Court on March 4, 1993, and the petitioner filed his petition for writ of certiorari on June 2, 1993. This petition was returned to him for failure to comply with Supreme Court Rules. The instant petition was filed on July 2, 1993, and received by respondents on July 5, 1993.

3/ Section 4023 states in relevant part: "The supreme court may transfer to itself a cause in the appellate court."

ARGUMENT

I. THE CONNECTICUT SUPREME COURT DECISION IN *SCINTO V. STAMM* DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Petitioner Has Misstated The Holding Of The Connecticut Supreme Court

The petitioner begins his argument by misstating the opinion of the Connecticut Supreme Court. He claims that the Court held that due process does not require a judicial hearing into his essay answers because "there is sufficient procedural due process in the unlimited reexamination provided for admission to the bar." (Pet. br., 12). The petitioner then goes on to claim that this purported holding is in conflict with the rulings of other courts and with this Court which, he claims, hold that such a hearing is mandated by due process. (Pet. br., 14-16). In fact, the petitioner's characterization of all of these rulings is faulty, and the Connecticut opinion under review is not in conflict with any of them.

The Connecticut Supreme Court's ruling consists of two parts.[4/] First, the Court ruled that the petitioner had not sustained his burden of establishing that the grading system employed by the CBEC was arbitrary and capricious and led to gross grading errors. *Scinto v. Stamm*, 224 Conn. at 532-33, reprinted in Resp. App., A9-A10. In conjunction with this, the Court reviewed in detail the components of the grading system, and found that they formed "a carefully crafted system that is, in fact, designed to reduce the likelihood of any capricious or idiosyncratic scoring by an individual grader." *Id.* at 533; Resp. App., A10.

Second, the Court analyzed the grading system as a whole according to the balancing test contained in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and concluded that "a judicial hearing to regrade the applicant's essay answers is not constitutionally required." *Scinto v. Stamm*, 224 Conn. at 535, Resp. App., A12. In reaching this conclusion the Court described in detail the grading procedures employed by the CBEC:

> In July, 1982, after several years of consultation with nationally recognized bar examination experts, the defendants extensively revised the format of the Connecticut bar examination. As revised, the

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4/ The opinion also addressed a number of other assertions made by the petitioner, but none of them have been raised in this petition.

examination consists of two parts: a multiple choice portion, administered in most states and known as the Multistate Bar Examination (multistate), consisting of two hundred questions; and an essay portion consisting of twelve questions. The examination as a whole is designed to test the minimal competency of a candidate to practice law in Connecticut. The present system was designed to standardize passing scores, provide for consistency in grading and to protect against idiosyncratic grading and grading errors. There is no passing or failing score on either portion of the examination.

Grading of the essay answers is done so that the graders do not know the identify of the applicant whose answers they grade. Answers to the essay questions are graded on a scale from zero to seven. In most instances, all of the examination booklets containing the answer to one of the twelve questions are distributed among three graders. Each grader assigns a score to one third of the answer booklets. In order to ensure uniformity and consistency in grading essay answers, the three graders for a particular question meet, prior to grading the essay questions, to develop a model answer and to agree upon the weight to be assigned to each component to the answers.

A candidate's multistate score is added to the candidate's converted score on the essay portion of the examination to determine the total score. To pass the examination a candidate must attain a total score of 264. If a candidate's total score is within ten points, plus or minus, of the passing score, the essay portion of the

> examination is regraded by a different grader. If this second grader assigns the same score as the previous grader for a particular question, then that score becomes the final score for that question. If the scores of the two graders differ by only one point, then the two scores are averaged. If the two scores differ by more than one point, then the two graders read the answer for a third time and agree upon the final score for that question. If a candidate's score after this process is 264 or greater, then the candidate has passed the examination, and conversely, a candidate receiving a score below 264 has failed the examination. There is no limitation on the number of times a candidate who has received a failing score may retake the examination.

Id. at 528-30; Resp. App., A-5-A7 (footnotes omitted).

The Court noted that the elaborate procedures described above combined to reduce significantly the potential capriciousness of any one grader. By contrast, the Court noted, the risk of arbitrary grading would actually *increase* in a judicial regrading of a failing examination because "(1) the applicant's anonymity would be lost; and (2) the scoring judge would not have had the benefit of a calibration session and the experience of grading multiple answers." *Id.*, 536-37; Resp. App., A13-A14.

The Court found that, *in addition to* the above described safeguards and multiple reviews of

examinations provided in the grading system, the CBEC provided as an additional safeguard the unlimited right to retake the bar examination as often as desired. After weighing *all of these factors* according to the *Mathews* balancing test, the Court concluded:

> The ultimate balance of the relevant factors compels the conclusion that a judicial hearing for the purposes of regrading the plaintiff's answers on the essay portion of the examination is not necessary to assure fundamental fairness. Consequently, pursuant to our consideration of the factors set forth in *Mathews*, we conclude that a bar applicant is not constitutionally entitled to such a hearing, and thus the trial court properly denied the plaintiff's motion for summary judgment and granted summary judgment for the defendants.

Id. at 539; Resp. App., A16 (footnote omitted).

The petitioner's present claim before this Court that the Connecticut Court's ruling rests on the unlimited opportunity for reexamination, standing alone, is false, and is belied by the words of the opinion itself. In fact, the Court's ruling rests on a careful analysis of the totality of the procedures employed by the CBEC, and, as will be discussed, does not conflict with the decision of any other court.

B. The Connecticut Supreme Court Opinion Does Not Conflict With The Holding Of Any Other Court

The petitioner claims that the Connecticut decision in *Scinto v. Stamm* conflicts with the holdings of a number of lower court cases, which he claims require judicial hearings to regrade bar examinations. Pet. br., pp. 14-17. A review of these cases, however, reveals that, not only do none of them conflict with the holding of the Connecticut decision, all of them actually support it. Several of the cited cases are directly contrary to the petitioner's position, and hold outright that due process does *not* require a judicial hearing of bar examination answers: *Loeb v. New York State Board of Law Examiners*, 144 App. Div. 2d. 813 (N.Y. App., 3rd Dept., 1988); *Bowens v. Board of Law Examiners, Etc.*, 291 S.E. 2d. 170, 172 (N.C. App. (1982); *Bailey v. Board of Law Examiners*, 508 F.Supp. 106 (W.D. Texas 1980); *Feldman v. State Board of Law Examiners*, 438 F.2d. 699 (8th Cir. 1971); and *In re Mead*, 361 N.E. 2d 403 (Mass. 1977). Several other cases cited by the petitioner hold that there is no right to a judicial reexamination of bar examination results in the absence of clear, probative facts establishing fraud, imposition, discrimination, or manifest unfairness on the part of the bar examiners, a position in accord with and noted in the *Scinto* decision,

but not at issue in the present case:[5/] *In re Thorne*, 635 P.2d 22 (Utah 1981); *In re Reardon*, 378 A.2d. 614 (Del. 1977); *Hooban v. Board of Governors*, 85 Wn. 2d 774, 539 P.2d 686 (1975); *Petition of DeOrsey*,[6/] 312 A.2d. 720 (R.I. 1973); *Application of Peterson*, 459 P.2d. 703 (Alaska 1969). Two cases did not concern hearings into bar examination answers at all: *Woodard v. Virginia Bd. of Bar Examiners*, 420 F.Supp. 211 (E.D. Va. 1976); *Cupples v. Watson*, 204 F.2d 58 D.C. Reports (D.C. Cir. 1953). Finally, one case, *Richardson v. McFadden*, 540 F.2d. 744 (4th Cir. 1976), states in dicta that the right of reexamination, *standing alone*, does not satisfy due process, but the Court could not determine from the record what review procedures if any the bar examiners provided, and did not decide what system would satisfy due process. The Connecticut procedure, as noted, provides a built-in system of review, *in addition to* an unlimited opportunity to retake the examination.

None of the cases cited by the petitioner even suggests that a failing applicant is constitutionally

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5/ The Connecticut Supreme Court expressly noted that the petitioner had not asserted any facts to support a claim of fraud, imposition, discrimination, or manifest unfairness. *Scinto v. Stamm*, 244 Conn. at 538; Resp. App., A15.

6/ The petitioner incorrectly states that the Courts in *DeOrsey* and *Thorne* regraded bar examinations. This is simply not true. The respondents are aware of no case in which a court regraded a bar examination.

entitled to a judicial hearing into his essay answers simply because he believes that he should have received a higher grade, which is the essence of the petitioner's claim. In short, none of the cited cases conflicts with the Connecticut *Scinto* decision, or even stands for the proposition that the petitioner asserts. [7/] These cases then provide no basis for granting a writ of certiorari in this case.

Nor does the *Scinto* decision conflict with any decision of this Court. As noted, the Connecticut Supreme Court carefully and correctly applied the *Matthews v. Eldridge* balancing test in determining that a judicial hearing is not constititutionally mandated, *Scinto v. Stamm*, 224 Conn. at 535-39, Resp. App. A12-A16, and contrary to the petitioner's apparent suggestion in his petition, this Court has never held otherwise.[8/]

7/ Similarly, the petitioner has misstated the holdings of a number of prior Connecticut cases. Pet. Br., 19. Not one of the cited cases concerns judicial review of bar examinations, or anything else relevant to the issues presented to this Court.

8/ *Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232, 239 (1957), established a rational basis standard for any due process challenge to a state's requirements for admission to its bar. This standard has frequently been applied by courts considering challenges to bar examination

(footnote cont'd)

Consequently, the petitioner's claim that conflicts exist among courts on the relevant constitutional issue is simply false, and provides no basis for granting the petition.

(footnote cont'd from previous page)

procedures, including the Connecticut Supreme Court in the case at bar. *Scinto v. Stamm*, 224 Conn. at 531-33; Resp. App. A8-A10. *See also Tofano v. Supreme Court of Nevada*, 718 F.2d 313, 315 (9th Cir. 1983); *Tyler v. Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975), *reh. denied*, 521 F.2d 815, *cert. denied*, 426 U.S. 940 (1976); *McGinn v. State Bar Board of North Dakota*, 399 N.W. 2d 864, 867 (N.D. 1987).

Contrary to petitioner's suggestion (Pet. br., 21-22), a strict scrutiny analysis is not required, and cases he has cited for this proposition are clearly inapposite. *See, In re Griffiths*, 413 U.S. 177 (1973), and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which deal with rights of non-residents or non-citizens to be admitted to a state's bar; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which concerns First Amendment commercial speech, and *Truax v. Raich*, 239 U.S. 33 (1915) which has nothing to do with admission to the bar, but concerns the right of non-citizens to be employed within a state.

II. THE ISSUES PRESENTED IN THIS CASE DO NOT WARRANT THIS COURT'S REVIEW

The essence of the petitioner's claim is that, since he did not pass the Connecticut bar examination, there must have been something wrong with it. As the Connecticut Supreme Court noted, although the case was decided on cross-motions for summary judgment, the petitioner presented *no evidence* outside of his own opinion that his answers were erroneously graded, or that the grading procedures were unfair:

> Nowhere in his supporting documentation does the plaintiff offer anything but his own opinion and conclusions, based primarily on unsworn factual assertions-contained not in his affidavit, but in his accompanying memoranda, that the grading procedures used by the defendants were unfair. Unsworn assertions of fact, summary conclusions of law and unsupported allegations in an affidavit do not entitle a party to a summary judgment...Similarly, the plaintiff, instead of offering evidence that the defendants' system of grading somehow does not conform to accepted and sound nationwide methods of scoring bar examinations, offered only his opinion

> that his answers to several of the essay questions should have received higher scores.

Scinto v. Stamm, 224 Conn. 532-33, Resp. App. A9-A10. (citations omitted).

The undisputed evidence in the case establishes that the grading procedures employed by the CBEC were initiated after lengthy consultation with national testing experts, and are currently in use in a majority of states. *Scinto v. Stamm*, 224 Conn. at 533, Resp. App.. Courts evaluating these procedures have uniformly upheld them, *id.* at 533-34, Resp. App.A10-A11, and the Connecticut Supreme Court's inquiry into their constitutional adequacy was thorough and reasoned.

Although the petitioner may be understandably disappointed that he has been unable to pass the Connecticut bar examination, his case presents no issue which merits this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the Connecticut Supreme Court in this matter should be denied.

Respectfully submitted,

RESPONDENTS
R. David Stamm
Connecticut Bar
Examining Committee

RICHARD BLUMENTHAL
ATTORNEY GENERAL

CAROLYN K. QUERIJERO
Assistant Attorney General
Counsel of Record
55 Elm Street
Hartford, CT 06141-0120
Tel. (203) 566-4990

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APPENDIX OF THE RESPONDENTS

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Connecticut Supreme Court decision in
Scinto v. Stamm (corrected version) A1

JOHN J. SCINTO *v.* R. DAVID STAMM ET AL. (14538)

CALLAHAN, BORDEN, BERDON, SANTANIELLO and F. X. HENNESSY, Js.

The plaintiff, who had received a failing grade on the state bar examination, sought a declaratory judgment to determine the constitutionality of the grading procedures used by the defendant bar examining committee. The trial court denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment. From the judgment against him, the plaintiff appealed. *Held:*

1. The trial court properly denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment; contrary to the plaintiff's claim that the grading procedures employed by the defendants are arbitrary and capricious and therefore violated his due process rights, the defendant's grading procedures have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law.
2. The plaintiff's claim to the contrary notwithstanding, there is no constitutional right to a judicial hearing for the purpose of regrading an unsuccessful applicant's answers on the essay portion of the bar examination; the right to retake the examination provides adequate procedural protection.

(One justice dissenting)

Argued November 5, 1992—decision released February 9, 1993

Action for declaratory judgment to determine the constitutionality of the defendants' grading procedures for the state bar examination, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *McGrath, J.*, denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

John J. Scinto, pro se, the appellant (plaintiff).

Carolyn K. Querijero, assistant attorney general, with whom, on the brief, was *Richard Blumenthal,* attorney general, for the appellees (defendants).

BORDEN, J. The principal issues in this appeal are: (1) whether the grading procedures of the Connecticut bar examining committee are arbitrary and capricious and therefore violate due process of law; and (2) whether a bar applicant who receives a failing score on the bar examination is constitutionally entitled to a judicial hearing for the purpose of regrading the applicant's answers on the essay portion of the examination. The plaintiff, John J. Scinto, appeals from the judgment of the trial court denying his motion for summary judgment and granting the motion for summary judgment of the defendants, the Connecticut bar examining committee, and R. David Stamm, its administrative director.[1] We affirm the judgment of the trial court.

The relevant facts and procedural history are as follows. In July, 1989, the plaintiff took the Connecticut bar examination and received a failing score of 262.79,

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).

which was below the standard passing score of 264.[2] The defendant then took the February, 1990 bar examination but again failed, receiving a score of 260.67. The plaintiff thereafter filed this petition in Superior Court seeking, inter alia: (1) a judicial hearing for the purpose of regrading his essay answers for the July, 1989 bar examination; (2) an injunction ordering the defendants to admit him to the Connecticut bar; and (3) a declaratory judgment that the defendants' regulations governing admission to the bar are invalid because they violate the due process clauses of the federal and state constitutions.

The defendants moved to dismiss the plaintiff's petition on the grounds that the court lacked subject matter jurisdiction because: (1) the doctrine of sovereign immunity barred the plaintiff's claims; and (2) the plaintiff's request for a declaratory judgment did not comply with Practice Book § 390 (d)[3] since proper notice had not been given to other interested parties. While this motion was pending, the plaintiff moved for permission to amend his petition by adding a claim arising out of his failure to pass the February, 1990 bar examination. The defendants opposed the motion to amend, but later agreed to withdraw their objection on the condition that the pending motion to dismiss would be made applicable to the claim arising out of the February, 1990 examination.

The trial court, *Thim, J.*, subsequently denied the defendants' motion to dismiss, ruling that the doctrine of sovereign immunity did not bar the plaintiff's claims

[2] The defendant had failed the exam on at least two occasions prior to the July, 1989 exam. He does not contest, however, the procedures for grading his examinations on the occasions prior to the July, 1989 examination.

[3] Practice Book § 390 provides in relevant part: "The court will not render declaratory judgments upon the complaint of any person . . . (d) unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof."

and that the court had subject matter jurisdiction over the declaratory judgment claim because the plaintiff, pursuant to *State ex rel. Kelman* v. *Schaffer,* 161 Conn. 522, 528, 290 A.2d 327 (1971), was entitled to cure the lack of notice prior to a final judgment. The defendants then filed an answer to the plaintiff's petition denying all of the plaintiff's claims.[4] The defendants also asserted, by way of special defense, that the doctrine of sovereign immunity barred the action because "the allegations of the complaint do not clearly demonstrate an incursion upon constitutionally protected interests." The plaintiff then moved to strike the defendants' special defense, and subsequently the trial court, *Thim J.,* denied the motion.

Both sides moved for summary judgment. The trial court, *McGrath, J.,* denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment. The trial court concluded that: (1) the grading procedures employed by the defendants were not arbitrary or capricious and therefore do not violate due process; (2) the plaintiff was not constitutionally entitled to a judicial hearing for the purpose of regrading his answers to the essay portion of the bar examination; and (3) the trial court lacked subject matter jurisdiction over the declaratory judgment aspect of the plaintiff's claim because the

[4] The plaintiff claims that, because the defendants' answer does not deny his allegations that he passed the February, 1990 bar examination, he was entitled to summary judgment on that claim. Although the trial court did not address this issue in its memorandum of decision on the motions for summary judgment, the plaintiff's claim is without merit.

The plaintiff never filed an amended petition to include the February, 1990 bar examination. Consequently, when the defendants filed their answer to the plaintiff's petition, they responded to all of the allegations contained in the petition. That petition asserted claims related to the July, 1989 examination only and, therefore, the defendants could not have answered a claim regarding the February, 1990 examination that was not included in that petition.

plaintiff had not attempted to notify any interested parties pursuant to the requirements of Practice Book § 390 (d). On appeal, the plaintiff claims that the trial court improperly: (1) concluded that the grading procedures of the defendants are not arbitrary and capricious and therefore do not violate due process; (2) concluded that he was not constitutionally entitled to a judicial hearing for the purposes of regrading his answers to the essay portion of the examination; and (3) denied his motion to strike the defendants' special defense.[5]

I

The plaintiff first claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because the grading procedures of the defendants are arbitrary and capricious and therefore violate his due process rights. We disagree.

In July, 1982, after several years of consultation with nationally recognized bar examination experts, the defendants extensively revised the format of the Connecticut bar examination. As revised, the examination consists of two parts: a multiple choice portion, administered in most states and known as the Multistate Bar Examination (multistate), consisting of two hundred questions;[6] and an essay portion consisting of twelve

[5] The plaintiff also appears to claim in his reply brief that the trial court improperly concluded that it lacked subject matter jurisdiction over the plaintiff's declaratory judgment claim. Absent exceptional circumstances, we will not review claims raised for the first time in an appellant's reply brief. See *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 716, 535 A.2d 799 (1988); *Clark* v. *Gibbs*, 184 Conn. 410, 420, 439 A.2d 1060 (1981). An appellant's failure to raise a claim until its reply brief does not give the appellee a proper opportunity to respond. *DeLucia* v. *Burns*, 11 Conn. App. 439, 444, 527 A.2d 1234, cert. denied, 205 Conn. 803, 531 A.2d 935 (1987). We therefore conclude that this issue is not properly before this court.

[6] The answers to the multistate are scored by computer. The raw score equals the number of questions answered correctly out of the two hundred

questions. The examination as a whole is designed to test the minimal competency of a candidate to practice law in Connecticut. The present system was designed to standardize passing scores, provide for consistency in grading and to protect against idiosyncratic grading and grading errors. There is no passing or failing score on either portion of the examination.

Grading of the essay answers is done so that the graders do not know the identity of the applicant whose answers they grade. Answers to the essay questions are graded on a scale from zero to seven. In most instances, all of the examination booklets containing the answer to one of the twelve questions are distributed among three graders.[7] Each grader assigns a score to one third of the answer booklets. In order to ensure uniformity and consistency in grading essay answers, the three graders for a particular question meet, prior to grading the essay questions, to develop a model answer and to agree upon the weight to be assigned to each component of the answers.

A candidate's multistate score is added to the candidate's converted score[8] on the essay portion of the

questions. The Multistate Bar Examining Committee then scales the raw score to compensate for any degree of difficulty of the test in comparison to prior administrations of the multistate in previous years. The defendants use the multistate scaled score in calculating an applicant's total score for the Connecticut bar examination.

[7] The Connecticut bar examination is administered twice a year: once in February and once in July. Because the number of candidates that sit for the February examination is significantly lower than the number that sit in July, the defendants sometimes assign only two graders to a particular essay question on the February examination.

[8] The defendants use a complex mathematical formula to convert the essay scores to the multistate scale. The formula is as follows:

SS = Xb + Sb/Sa (Rs − Xa) where

SS = Essay examination score on the multistate scale.

Xb = Average Connecticut applicant's multistate score.

Sb = Standard deviation of Connecticut applicant's multistate score.

Sa = Standard deviation of essay portion raw scores.

Rs = Applicant's essay portion raw score.

Xa = Average essay portion raw score.

examination to determine the total score. To pass the examination a candidate must attain a total score of 264. If a candidate's total score is within ten points, plus or minus, of the passing score, the essay portion of the examination is regraded by a different grader. If this second grader assigns the same score as the previous grader for a particular question, then that score becomes the final score for that question. If the scores of the two graders differ by only one point, then the two scores are averaged. If the two scores differ by more than one point, then the two graders read the answer for a third time and agree upon the final score for that question. If a candidate's score after this process is 264 or greater, then the candidate has passed the examination, and conversely, a candidate receiving a score below 264 has failed the examination. There is no limitation on the number of times a candidate who has received a failing score may retake the examination.

"The standard of review of a trial court's decision to grant a motion for summary judgment is well established. Pursuant to Practice Book § 384, summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact; *D.H.R. Construction Co.* v. *Donnelly,* 180 Conn. 430, 434, 429 A.2d 908 (1980); a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. Practice Book §§ 380, 381; *Burns* v. *Hartford Hospital,* [192 Conn. 451, 455, 472 A.2d 1257 (1984)]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Town*

Bank & Trust Co. v. *Benson*, 176 Conn. 304, 309, 407 A.2d 971 (1978). *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313, 317, 477 A.2d 1005 (1984). . . ." (Internal quotation marks omitted.) *Connecticut Bank & Trust Co.* v. *Carriage Lane Associates*, 219 Conn. 772, 780–81, 595 A.2d 334 (1991).

In light of the similarity of issues raised in the two motions for summary judgment, we consider the trial court's disposition of the motions together. The plaintiff, in support of his motion for summary judgment and in opposition to the defendants' motion for summary judgment, filed memoranda, copies of the essay examination questions and his answers, and a personal affidavit. The substance of these documents can be distilled into two particular claims: (1) that his essay answers were scored by impermissibly subjective grading standards that resulted in gross grading errors; and (2) that because he received a score that was close to a passing score, there is no substantial difference between his failing score and a passing score, and thus the defendants arbitrarily and capriciously concluded that he was not minimally competent to practice law in Connecticut.

The United States Supreme Court's decision in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), established the appropriate standard by which to analyze the plaintiff's claim. "A State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a *rational connection* with the applicant's fitness or capacity to practice law." (Emphasis added.) Id.; *Scott* v. *State Bar Examining Committee*, 220 Conn. 812, 820, 601 A.2d 1021 (1992).

The plaintiff, pursuant to his motion for summary judgment, had the heavy burden of establishing that the grading procedures employed by the defendants are arbitrary and capricious, and that they have no rational connection to achieving the legitimate state interest of requiring minimal competency to practice law. See, e.g., *Tofano* v. *Supreme Court of Nevada*, 718 F.2d 313, 315 (9th Cir. 1983); *Tyler* v. *Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975), reh. denied, 521 F.2d 815 (5th Cir.), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976); *Chaney* v. *State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S. Ct. 1262, 20 L. Ed. 2d 162 (1968); *McGinn* v. *State Bar Board of North Dakota*, 399 N.W.2d 864, 867 (N.D. 1987); *Petition of Wayland*, 510 P.2d 1385, 1387 (Okla. 1973). Courts have uniformly held that an examination consisting of essays is not overly subjective, and is a rational method of assessing a candidate's competency to practice law. See, e.g., *Tofano* v. *Supreme Court of Nevada*, supra; *McGinn* v. *State Bar Board of North Dakota*, supra; *Dinger* v. *State Bar Board of North Dakota*, 312 N.W.2d 15, 18 (N.D. 1981). Likewise, a state is entitled to establish a minimum score for passing a bar examination without offending due process. *In re Fischer*, 425 A.2d 601, 602 (Del. 1980); *Dinger* v. *State Bar Board of North Dakota*, supra; *Petition of Pacheco*, 85 N.M. 600, 604, 514 P.2d 1297 (1973); see also *Bailey* v. *Board of Law Examiners of Texas*, 508 F. Sup. 106, 108 (W.D. Tex. 1980).

The trial court concluded that "[t]he plaintiff has not submitted any evidence to support his allegations that the [defendants'] procedures resulted in gross grading errors. Further, the plaintiff submits no evidence to rebut the [defendants'] affidavit." We agree. Nowhere in his supporting documentation does the plaintiff offer anything but his own opinion and conclusions, based primarily on unsworn factual assertions—contained not

in his affidavit, but in his accompanying memoranda, that the grading procedures used by the defendants were unfair. Unsworn assertions of fact, summary conclusions of law and unsupported allegations in an affidavit do not entitle a party to a summary judgment. See, e.g., *Bartha* v. *Waterbury House Wrecking Co.*, 190 Conn. 8, 12, 459 A.2d 115 (1983); *Rathkopf* v. *Pearson*, 148 Conn. 260, 264, 170 A.2d 135 (1961) ("[a]n allegation setting forth no evidentiary facts avails nothing").

The plaintiff failed to offer evidence that setting the passing score at 264 is arbitrary or capricious. The defendants' affidavit in support of their motion for summary judgment, moreover, stated that they arrived at the passing score only after extensive consultation with testing experts. Similarly, the plaintiff, instead of offering evidence that the defendants' system of grading somehow does not conform to accepted and sound nationwide methods of scoring bar examinations, offered only his opinion that his answers to several of the essay questions should have received higher scores.

The defendants' extensive affidavit meticulously described the current format of the bar examination, its procedural safeguards and its provision for multiple review of examinations falling within ten points of the passing score. The affidavit set forth a carefully crafted system that is, in fact, designed to reduce the likelihood of any capricious or idiosyncratic scoring by an individual grader. Each answer is compared to the model answer created by three graders at a calibration session, and an answer may be read up to two additional times if the answer is part of an examination whose score falls within ten points of the passing score, and if there is any disagreement as to the proper score for that answer.

According to the undisputed contention of the defendants, this system is "state of the art" and is currently in use in most states. Courts have uniformly upheld

grading systems such as the defendants' that offer multiple protections from arbitrary grading. See, e.g., *Tyler* v. *Vickery*, supra, 1105; *Singleton* v. *Louisiana State Bar Assn.*, 413 F. Sup. 1092, 1099–1100 (E.D. La. 1976); *In re Application of Bettine*, Docket No. S-4985 (Alaska Nov. 13, 1992); *Mississippi Board of Bar Admissions* v. *Applicant F.*, 582 So. 2d 377, 384 (Miss.), cert. denied sub nom. *Zebert* v. *Mississippi Board of Bar Admissions*, U.S. , 112 S. Ct. 591, 116 L. Ed. 2d 616 (1991); *Loeb* v. *New York State Bar Board of Law Examiners*, 144 App. Div. 2d 813, 534 N.Y.S.2d 559 (1988); *McGinn* v. *State Bar Board of North Dakota*, supra; *Dinger* v. *State Bar Board of North Dakota*, supra, 16; *Hooban* v. *Board of Governors of Washington State Bar Assn.*, 85 Wash. 2d 774, 539 P.2d 686 (1975), appeal dismissed, 424 U.S. 902, 96 S. Ct. 1092, 47 L. Ed. 2d 306 (1976); and other cases cited in annot., Validity, Under Federal Constitution, of State Bar Examination Procedures, 30 A.L.R. Fed. 934 (1976 & Sup. 1992). Under these circumstances, we conclude that the grading procedures employed by the defendants have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law. Consequently, the trial court properly denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment.

II

The plaintiff next claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because he is constitutionally entitled, as a matter of procedural due process,[9] to a judicial hearing for the purpose of regrading his answers on the essay portion of the bar examination. We disagree.

[9] Although the plaintiff purports to rely on both the federal and state constitutions, he has failed to brief or analyze independently any state constitutional provision. Consequently, we limit our discussion to the relevant

The United States Supreme Court set forth three factors to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Id., 335.

Application of the *Mathews* test to the present case compels the conclusion that a judicial hearing to regrade the applicant's essay answers is not constitutionally required. Admittedly, under the first prong of *Mathews*, an applicant has a strong interest in pursuing his chosen profession. *Tyler* v. *Vickery*, supra, 1104. An individual does not have, however, an absolute right to practice law. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *Jones* v. *Board of Commissioners of Alabama State Bar*, 737 F.2d 996, 1002 (11th Cir. 1984). Whether the applicant's interest is of sufficient weight to compel the requested relief can be determined only by analyzing the second and third prongs of *Mathews*. *Lucero* v. *Ogden*, 718 F.2d 355, 358–59 (10th Cir. 1983),

federal constitutional claim. *State* v. *Joly*, 219 Conn. 234, 258 n.16, 593 A.2d 96 (1991).

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . . ."

cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

The applicant's interest "militates . . . in favor of a hearing only if hearings are [a] demonstrably more efficacious means of safeguarding that interest than" the other procedural protections that the defendants currently provide. *Tyler* v. *Vickery*, supra, 1104. In the present case, there is no evidence that the defendants' grading system is not effective in revealing grading errors or that it inadequately guards against the risk, if any, of an erroneous deprivation of an applicant's interest.[10] On the contrary, there is uncontroverted evidence that the defendants' system of grading, by providing multiple rereadings of examinations that fall within ten points of a passing score, effectively protects against idiosyncratic or arbitrary grading. Although the grading of any essay examination may involve some inherent subjectivity, the potential capriciousness of any one grader is significantly reduced by: (1) the use of examination numbers to protect the identity of the applicant; (2) the use of a model answer by which to measure an applicant's answer; (3) the regrading of any examination that falls within ten points of passing; and (4) the consultation between graders, and the use of a consensus grade, if the two graders' scores differ by more than one point.

In support of his motion for summary judgment and in opposition to the defendants' motion for summary judgment, the plaintiff did not offer any evidence that the relief he requested would reduce the likelihood of grading errors. The regrading of an answer by a Superior Court judge would not lessen the inherent subjectivity of grading the essay answers. To the contrary, the risk of arbitrary grading would be likely to increase

[10] The plaintiff has not claimed that the defendants committed a mathematical error in computing his total score. His claim is simply that he was entitled to a higher score on several of his answers to the essay questions.

if a judge were to regrade an answer because: (1) the applicant's anonymity would be lost; and (2) the scoring judge would not have had the benefit of a calibration session and the experience of grading multiple answers.

Furthermore, the defendants provided evidence, pursuant to their summary judgment burden, of an additional procedural safeguard to protect applicants from arbitrary grading: an unlimited right to retake the bar examination. Most courts have found that the right to retake the examination, by itself, provides adequate procedural protection to a bar applicant. See, e.g., *Jones* v. *Board of Commissioners of Alabama State Bar*, supra, 1003 (lack of judicial hearing does not violate due process because candidate may take examination up to five times); *Lucero* v. *Ogden*, supra, 358; *Poats* v. *Givan*, 651 F.2d 495, 497 (7th Cir. 1981) (right to retake examination four times); *Tyler* v. *Vickery*, supra, 1104; *In re Mead*, 372 Mass. 253, 256, 361 N.E.2d 403 (Mass. 1977), cert. denied, 434 U.S. 858, 98 S. Ct. 182, 54 L. Ed. 2d 131 (1977). As the United States Court of Appeals for the Fifth Circuit reasoned, even if we assume, generously, that one out of every one hundred applicants who fail the bar examination would have passed but for arbitrary grading, the probability that the same applicant would be the victim of a grading error after two examinations is literally one in ten thousand.[11] *Tyler* v. *Vickery*, supra, 1104.

[11] We note that the Fifth Circuit in *Tyler* v. *Vickery*, 517 F.2d 1089, 1104 (5th Cir.), reh. denied, 521 F.2d 815 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976), stated the probability that the same applicant would be the victim of a grading error after two examinations is "literally one in a million." Although we do not profess to any particular acumen for the theory of probabilities, our research reveals that, under the assumptions applied by the Fifth Circuit, the probability of failure is one in ten thousand. See generally R. Epstein, The Theory of Gambling and Statistical Logic (Rev. Ed. 1977) 12–24. We conclude, nevertheless, that a one in ten thousand chance of a grading error does not constitute, as a matter of law, an arbitrary or capricious procedure in violation of the applicant's due process rights.

With one limited exception,[12] every court addressing the question of whether an applicant is constitutionally entitled to a judicial hearing to regrade essay answers on a bar examination has concluded that a state is not obligated to provide such a hearing. See, e.g., *Jones* v. *Board of Commissioners of Alabama State Bar*, supra; *Lucero* v. *Ogden*, supra, 358; *Tyler* v. *Vickery*, supra; *In re Mead*, supra; *Mississippi Board of Bar Admissions* v. *Applicant F.*, supra, 384 ("[w]e decline Applicant F's invitation that we usurp [the bar examiner's] duties and responsibilities by regrading his examination"); *Petition of Pacheco*, supra, 604; *Loeb* v. *New York State Bar Board of Law Examiners*, supra; *McGinn* v. *State Bar Board of North Dakota*, supra, 867; *Petition of Wayland*, supra, 1387; and other cases cited in annot., Court Review of Bar Examiners' Decision on Applicant's Examination, 39 A.L.R.3d 719 (1971 and Sup. 1992). Courts have consistently refused to embark on any inquiry into the integrity of examination results in the absence of clear and unequivocal allegations of probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of the bar examiners. See, e.g., *Feldman* v. *State Board of Bar Examiners*, 438 F.2d 699, 704 (8th Cir. 1971); *Staley* v. *State Bar of California*, 17 Cal. 2d 119, 121, 109 P.2d 667 (1941); *In re Reardon*, 378 A.2d 614, 618 (Del. 1977); *Petition of Pacheco*, supra; *In re Thorne*, 635 P.2d 22, 23 (Utah 1981); *Hooban* v. *Board of Governors of Washington State Bar Assn.*, supra. In the present case, the plaintiff has not asserted any facts to support such a claim.

[12] In *Richardson* v. *McFadden*, 540 F.2d 744, 752 (4th Cir. 1976), cert. denied, 435 U.S. 968, 98 S. Ct. 1606, 56 L. Ed. 2d 59 (1978), the United States Court of Appeals for the Fourth Circuit stated that it was not persuaded that reexamination is a more effective remedy than judicial review. The court, however, did not analyze whether reexamination satisfies due process, but only concluded that "reexamination is [not] a more effective remedy than review." Id. No court has cited this statement in *Richardson* with approval. Moreover, the court did not need to reach that issue, and

Finally, pursuant to the third prong of *Mathews*, requiring a judicial hearing for the purpose of regrading an applicant's essay answers would impose a substantial fiscal and administrative burden on the judicial system. As a practical matter, there is a significant risk that virtually every candidate who failed the bar examination, having little to lose, would request a judicial regrading of the examination answers. A flood of biannual petitions would impose an "intolerable burden" on the court system. See *Lucero* v. *Ogden*, supra, 358; *Tyler* v. *Vickery*, supra, 1105; *Whitfield* v. *Illinois Board of Law Examiners*, 504 F.2d 474, 478 (7th Cir. 1974). Such a burden is unjustified if the procedural protections to be gained from such a burden are minimal or nonexistent.

The ultimate balance of the relevant factors compels the conclusion that a judicial hearing for the purposes of regrading the plaintiff's answers on the essay portion of the examination is not necessary to assure fundamental fairness. Consequently, pursuant to our consideration of the factors set forth in *Mathews*, we conclude that a bar applicant is not constitutionally entitled to such a hearing, and thus the trial court properly denied the plaintiff's motion for summary judgment and granted summary judgment for the defendants.[13]

thus the statement was dicta. See *Lucero* v. *Ogden*, 718 F.2d 355, 357 (10th Cir. 1983), cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

[13] The plaintiff also argues that, despite the lack of a statutory or Practice Book provision providing for a right to a judicial hearing for the purpose of regrading his answers, he is nonetheless entitled to this procedure because of an "informal" state history of allowing such hearings. The plaintiff does not cite, however, nor does our research uncover, any case in which a court regraded an applicant's answers. Although we have reviewed the defendants' denial of a candidate's application for admission on character grounds; see, e.g., *Fairfield Bar Committee* v. *Esterman*, 174 Conn. 548, 392 A.2d 452 (1978); *In re Application of Dinan*, 157 Conn. 67, 244 A.2d 608 (1968); we have not inquired into the defendants' decision that a given applicant is not minimally competent to practice law in Connecticut. Consequently, we decline to hold that the plaintiff is entitled to a proceeding that simply does not exist, and has not existed, under our law.

III

The plaintiff's final claim is that the trial court improperly denied his motion to strike the defendants' special defense of sovereign immunity. The trial court, however, did not predicate its grant of summary judgment for the defendants on the doctrine of sovereign immunity. Consequently, the plaintiff is not aggrieved by the trial court's denial of his motion to strike the special defense. Furthermore, the defendants have not raised on appeal the issue of sovereign immunity, either as a basis of a cross appeal, or as an alternate ground to sustain the judgment of the trial court. We need not, therefore, consider this issue.

The judgment is affirmed.

In this opinion CALLAHAN, SANTANIELLO and F. X. HENNESSY, Js., concurred.

BERDON, J., dissenting. The defendants, the Connecticut bar examining committee and its administrative director, have neatly packaged their procedures with what they consider to be checks and balances to ensure that bar examinations are fairly graded. They fail, however, to address one aspect of due process that I consider to be of great importance—the perception of fairness. The plaintiff's only avenue for review of his essay examination was by the same committee responsible for his original grade, albeit different examiners. Furthermore, the plaintiff was never given the opportunity to confront the examiners in order to explain his position. In short, the review of his essay examination, which is very subjective, is, in the eyes of the applicant, part and parcel of the "Good Ole Boys" club--that is, by the same persons responsible for preparing, establishing the standards for and grading the examination. I do not believe this passes constitutional muster. I conclude that due process requires another level of review.

It is clear that a bar applicant must be afforded the protections of due process under the fourteenth amendment to the United States constitution. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); note, "Admission to the Bar: A Constitutional Analysis," 34 Vand. L. Rev. 655, 712 (1981). That process, however, must have "the appearance of evenhanded justice which is at the core of due process." *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 469, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Harlan, J., concurring) (criminal contempt proceedings); L. Tribe, American Constitutional Law (2d Ed. 1988) § 10-16, p. 745.

The facts of the present case underscore why an applicant should be given a postexamination hearing by a board other than the examining committee that administered the examination. The plaintiff, a graduate of Georgetown Law School, a distinguished law school, obtained a converted score of 262.79 on the July, 1989 bar examination, which was below the passing converted score of 264.[1] Two of the plaintiff's twelve essay questions received grades of only one out of a possible seven points. Another essay question received a mere two out of seven. If the plaintiff had received a raw score of one-half point more on any of the essay questions, including any of the above questions on which he only received one or two out of a possible seven points, he would have obtained the required converted score of 264. The diminutive value of one half of one point of a total of eighty-four possible points on a subjective examination is obvious.

The plaintiff claims that errors were made in the grading of his essay questions and that the grading process was "arbitrary and capricious." In opposition to the defendants' motion for summary judgment, the

[1] On the February, 1990 bar exam he received a score of 260.67.

plaintiff submitted the questions and his answers. The majority opinion concedes, as it must, that the essay questions are subjective. And in the field of jurisprudence, that subjectivity is at its highest. I take judicial notice of the fact that the "right" answers in the law today may be the wrong answers for tomorrow. For example, the "separate-but-equal" doctrine endorsed by the United States Supreme Court in *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), which segregated African-Americans, would not be tolerated as a right answer today. Nor would we accept today as passing constitutional muster a regulation that prohibited women from practicing law as the United States Supreme Court held in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873).

Given the fact that essay examinations are extremely subjective, that the plaintiff's converted score of 262.79 missed the mark by a mere one half of 1 percent, and that he was never given an opportunity to argue his position directly to the examiners who reviewed his initial score, it is understandable why he or any other person in his position would perceive that those who judged his examination were not evenhanded and that the system is not fair.

The majority, however, has a bottom line answer to this due process claim—that is, the plaintiff and others similarly situated can always retake the examination. I cannot accept this bottom line. In response to a similar argument, the Fourth Circuit Court of Appeals replied "*once is enough.*" (Emphasis added.) *Richardson* v. *McFadden*, 540 F.2d 744, 752 (4th Cir. 1976). ("To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that

delay in getting it is an injury.") I am sure that this sentiment would be echoed by most law school graduates, even those who have been admitted to the bar.

Accordingly, I would reverse the trial court's granting the defendants' motion for summary judgment and remand the matter for further proceedings.